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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-930**

DANIEL J. EVANS, ET AL.,

*Appellants,*

v.

ATLANTIC RICHFIELD COMPANY, ET AL.,

*Appellees.*

**BRIEF OF THE STATES OF MARYLAND,  
DELAWARE, MAINE, MINNESOTA AND NEW YORK  
AMICI CURIAE IN SUPPORT OF STATEMENT  
AS TO JURISDICTION**

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**INTERESTS OF AMICI CURIAE**

**STATE OF MARYLAND**

Maryland is a water-oriented state. Fifteen of Maryland's 23 counties border on tidal water. The length of tidal shoreline in the state is 3,190 miles.

The Chesapeake Bay encompasses 1,726 square miles in Maryland in addition to 1,511 square miles in Virginia. Navigable to ocean-going ships, the Bay has two outlets to the Atlantic Ocean, one through the Chesapeake and Delaware Canal and one through its mouth.

The Chesapeake Bay is the main source of Maryland's seafood industry, an industry which annually produces fish, crabs, oysters and clams valued at more than \$19 million dockside and more than \$50 million

when processed. Maryland produces more than 50% of the nation's clams, more than 50% of the nation's striped bass, and more than 30% of the nation's oysters. The Bay also produces more than one-half of the nation's blue crabs.

Maryland's fishing industry and related food-processing industry employ approximately 13,300 people, of which well over two-thirds are on a full-time basis. Recent studies have indicated that between 200,000 and 300,000 Marylanders annually spend an estimated \$20 million on goods and services needed to engage in saltwater angling. In addition to this, Maryland's fishing fleet has been valued as of January, 1970 at \$149 million.

The productivity of the Bay is dependent on a great many factors; each contributing to the attainment of the proper amount of oxygen, salinity, and nutrients in the Bay waters. The balance is indeed fragile, for the variance of these components by an almost imperceptible degree has drastic consequences on the Bay's productivity.

Maryland is most concerned that these activities be protected. The very large amounts of oil shipped annually through the Port of Baltimore pose a constant threat to Maryland waters. For the calendar year of 1975, approximately 13 million short tons of petroleum and petroleum products were shipped to and from Baltimore harbor. Some 4,033 ships used the port during 1975. Few states can claim so vital a maritime operation. The benefits that such a port bring to the people of Maryland must be balanced against the special dangers and responsibilities inherent in moving these very large amounts of oil and in directing Baltimore's increasingly busy facility.

The threat of debilitation of the Chesapeake Bay ecosystem by oil spills is an acknowledged risk to which

Maryland must respond. The factors to be considered and their ramifications are uniquely within the interests and prerogatives of Maryland. The issue to be resolved in this litigation, however, i.e., how far the State may legislate to respond to these problems, is common to all other estuarine port areas in the states of this country.

#### STATE OF DELAWARE

The coastal zone of Delaware is a valuable and, in many respects, irreplaceable resource of the State, region, and nation. Delaware has a salt-water shoreline approximately 260 miles long. All three counties border the Delaware Bay. No part of the State is more than about eight miles from tidewater. Because of Delaware's size and location, there is a continuous interaction of land and tidal water bodies influencing nearly all of the State.

The total shoreline along the Atlantic Ocean, Delaware Bay and Delaware River in the State is 115 miles long, of which 97 miles is considered suitable for recreation. Twenty-one tributaries in the Delaware River estuary provide waterways for recreation, in addition to the 15,500 acres of water in the Rehoboth, Indian River and Little Assawoman Bays.

The coastal bays of Delaware are part of a system of shallow-water estuaries which are the nursery and rearing grounds of most species of finfish important to both commercial and sport fisheries along the East Coast of the United States. About two-thirds of fish landed by American fishermen spend a vital part of their lives in an estuary.

Seafood landings in Delaware in 1975 were reported by the National Marine Fishery Service to be 797,200 pounds of finfish and 6,258,000 pounds of shellfish. The dockside value of the 1976 commercial shellfish industry was reported by the State Department of Natural

Resources and Environmental Control as \$1.64 million. The 1976 recreational fishing industry was valued at greater than \$10 million. The coastal resources-independent tourism industry is likewise a multi-million dollar business. In addition, State parks in Delaware's coastal zone accommodated 1,629,486 visitors in fiscal year 1976.

Estuaries and coastal wetlands are the most bountiful, productive areas in the world. They are also the most sensitive to oil spill effects. The Tanker Advisory Center in New York reports 60 million gallons of oil were spilled worldwide by oil tankers in 1976. Spilled oil can damage marine and marsh life in three ways:

1. By direct contact — crude oil and more volatile products coat marine organisms, birds, and animals. Certain animals will be suffocated and birds, when preening, swallow oil and often die.
2. Long term effects of spilled oil include the existence of oil in marine sediments where it becomes accessible to the marine food chain. Through the food chain petroleum derived hydrocarbons may continue to accumulate in marine organisms which are consumed by humans.
3. The cleanup of spilled petroleum can be damaging to marine and tidal marsh life. This results from the use of detergents and emulsifiers and also from personnel and equipment used in cleanup operations.

The volume of oil transported by tankers endangering Delaware's interests is enormous. The Army Corps of Engineers reports that 43,297,974 short tons of crude petroleum were transported by tankers up the Delaware Bay in 1975. Three hundred fifteen thousand gallons of this gigantic amount spilled into the Delaware River in January 1975 when the tanker CORINTHOS exploded, killing several people and thousands of waterfowl. On December 27, 1976, the Liberian tanker OLYMPIC GAMES spewed another 133,000 gallons of oil in the

Delaware River, killing more waterfowl. A few days later another oil tanker ran aground in the Delaware River, threatening further damage to Delaware's interests.

Unfortunately, the risk of oil tanker spills is much greater within state jurisdictional waters than on the high seas. Shallower water and more dense tanker traffic inevitably raise the odds of a catastrophic spill. Delaware's dependence on a clean Delaware River and Bay mandates that the State respond to the grave threat posed by tanker operations in these waters.

#### STATE OF MAINE

Maine has approximately 3,000 miles of coastline and 1,500 coastal islands. Eleven of Maine's 16 counties border on tidal water.

A substantial portion of the Maine economy is dependent upon the ocean resources. The Maine fishing and fish processing industries employ in excess of 15,000 people in fishing — processing and wholesaling. Maine lands approximately 150 million pounds of fish and shellfish annually, at a landed value in excess of \$31 million. The principal species of commercial fish are ocean perch, herring, cod, haddock, hake, pollack, flounder, shad, whiting, mackerel, tuna, alewives and some smelt and marine worms. The principal commercial shellfish are lobster, scallops, crabs, clams, mussels and shrimp. Maine carries on substantial regulatory and research programs for all of these species.

In addition to the direct economic value of the fisheries, the coastal environment is a noted tourist haven, annually attracting millions of visitors. Acadia National Park, located in Penobscot Bay in central Maine, is used by more than two and a half million persons annually. The economic benefit to the State from tourism is an important source of income to coastal Maine communities. Such areas are attractive

because they provide an opportunity to visit and view pristine coastal areas. In addition, the coast provides an important resource to the inhabitants of the State as a place of recreation and solace, and, in that respect alone, is of immeasurable value to the State. Maine has two major ports for oceangoing tankers. Tankers transship crude oil and refined products at Portland and Searsport. Major refining facilities have been proposed for Searsport, Portland, and Sanford, all of which would be dependent on foreign oil for sources of supply. A major oil facility is currently proposed for Eastport, Maine. Portland alone is one of the major crude oil facilities in the United States, and is the largest crude oil terminal on the East Coast. Crude oil received in Portland is exported to Montreal, Canada to refineries there.

The dangers resulting from the movement of oil in both domestic and foreign vessels poses a threat to this vital state resource. In the recent past large and small spills have damaged marine resources and public and private property. A recent large spill in Portland from a foreign-owned vessel damaged shellfishing areas in the southern coast of Maine, and caused extensive damage to the Maine coastline.

In response to this danger, Maine has enacted various statutes authorizing state agencies to regulate oil vessels, both foreign and domestic, and onshore facilities. These statutes and regulations were enacted because of the Maine legislature's conclusion that national statutes and standards were inadequate to protect Maine's resources, were drafted with considerations in mind other than protection of the Maine coastline and fisheries resources, and were generally not sufficiently rigorous to ensure to Maine the kind of protection necessary for this viable resource.

## STATE OF MINNESOTA

Minnesota is an inland state which is renowned for its water resources. For purposes of this litigation, the most significant water resources of Minnesota are Lake Superior and the Mississippi River. Lake Superior is the largest and purest freshwater body on this continent, and the Mississippi River is both a major economic and recreational waterway.

Oil is currently shipped from ports on Lake Superior and the Mississippi River. Dramatic increases in the transshipment of oil are anticipated to occur in the near future, particularly from the port of Duluth on Lake Superior. This increase in traffic will bring with it inevitable oil spillages.

In March, 1976, Minnesota convened a conference of the Great Lakes States to discuss the technological and legal methods of controlling spillage from oil transshipment. Among the recommendations from that conference was the passage of State legislation relating to controls on oil spillage.

The result below in the instant case casts doubt on Minnesota's authority to effectively implement such legislation. Thus, it is imperative that this Court review that decision to determine the appropriate federal-state relationship and responsibility in this vital area. Minnesota's interest in controlling such environmental effects has been demonstrated in the courts on many prior occasions. Among others, see *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975); *Minnesota v. EPA*, 512 F.2d 913 (8th Cir. 1975); *Minnesota v. Hoffman*, \_\_\_ F.2d \_\_\_, 9 ERC 1353 (8th Cir. 1976).

## STATE OF NEW YORK

New York's interest in protecting its two thousand-mile coastline, beaches, tidal wetlands and harbors from oil spills is great, and legislation to this effect has

been introduced in the legislature. New York's commercial ocean fish catch in 1975 amounted to 37.7 million pounds valued at \$86 million, employing nearly 10,000 commercial fishermen. Sport fishermen in New York's marine waters are estimated at 2.3 million persons, bringing in vast revenues to a wide variety of industries and services. As just one instance, 984,000 boaters based in New York used our Atlantic coastal waters as of 1970 — a number undoubtedly higher in more recent years.

The shellfish catch in New York, including Long Island's clams and oysters, is of equal commercial importance, and not just to New Yorkers. An oil spill in the waters where these mollusks breed and live would wreak incalculable economic as well as environmental harm.

In addition, New York has 600 miles of beaches on its marine shoreline, including all of the recreational beaches heavily used by New York City's 8 million residents. An oil spill disabling these beaches during the summer would be catastrophic to hundreds of thousands of our citizens, including urban residents of low and moderate incomes to whom access to other recreational facilities is scant.

The Interior Department's offshore oil drilling program, as well as the presence of numerous tankers in New York waters, renders legislation to protect our marine and coastal resources of vital importance. Finally, the port of New York, the Nation's busiest and largest, on which the livelihood of tens of thousands directly depends, and through which millions of tons of imports and exports are shipped, would be jeopardized by a major oil spill. All of these elements combine to make this litigation of crucial significance for New York, its businesses and their employees, and the well-being of its citizens.

## OPINION BELOW

The opinion below was entered by a Three-Judge Court for the Western District of Washington on September 24, 1976. Copies of the Opinion and Final Order are attached hereto as Appendix A.

## JURISDICTION

A Final Order of the Three-Judge District Court was entered on September 24, 1976. The jurisdiction of the Supreme Court to review this decision by appeal is pursuant to 28 USC §1253.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, Clause 2; the Commerce Clause, Article I, Section 8, Clause 3; and the Tenth Amendment. The Statutory provisions are 33 USC §1221, §1222, 46 USC 391(a) (the Ports and Waterways Safety Act), and Revised Washington Code §88.16.170 *et seq.* (the Washington Tanker Law). Copy of the Washington Tanker Law is attached hereto as Appendix B.

## QUESTIONS PRESENTED

1. Whether the Ports and Waterways Safety Act (codified at 33 USC 1221, 1222 and 46 USC 391(a)) preempts the states from exercising their police powers to protect their marine resources from irreparable damage caused by oil pollution from vessels.
2. Whether the maritime jurisdiction of the federal government preempts the proper exercise of the state police power to protect the state's marine resources from irreparable damage caused by oil pollution from vessels.

3. Whether the Interstate and Foreign Commerce Clause of the United States Constitution precludes the states from protecting the health, life and safety of their citizens and marine resources from the dangers of oil pollution from vessels.

### STATEMENT

The States of Maryland, Delaware, Maine, Minnesota and New York adopt the Statement of the Case contained within the Brief of Appellant.

### THE QUESTIONS ARE SUBSTANTIAL

#### I.

WHETHER THE PORTS AND WATERWAYS SAFETY ACT OF 1972 PREEMPTS THE STATES FROM ENACTING LEGISLATION TO PREVENT OIL SPILLS FROM OIL TANKERS ENTERING STATE TERRITORIAL WATERS.

The Ports and Waterways Safety Act, 33 USC §1221 *et seq.* (PSWA) does not expressly preempt all areas encompassed within the Act. The language of the Act specifically provides a state role by authorizing the states to adopt "higher safety equipment requirements or safety standards" relative to installations of port "structures" and higher safety standards regulating operation of oil tankers to safeguard the marine environment from oil pollution.

The District Court, without addressing itself to the lack of the express congressional statement on preemption, concluded that the PWSA preempted Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified as R.C.W. §88.16.170 *et seq.* (the Washington Tanker Law). It determined that the PWSA established a "comprehensive federal scheme for regulating the operations, traffic routes, pilotage and safety specifications of tankers". Appendix A. No authorities are recited by the District Court to support its conclusions. The effect of the Court's decision is to subject fragile

state resources, which historically were protected by the exercise of the police power, to the whims and programs of distant federal bureaucrats, thereby at least for the present, exposing the states' environment and economics to the perils of oil spills. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The District Court failed to recognize that exercise of state police power is not to be deemed preempted, absent an "unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). Similar warnings against federal preemption have been announced by this Honorable Court in *Reid v. Colorado*, 187 U.S. 137 (1902); *Napier v. Atlantic Coastline R. Co.*, 272 U.S. 605, 611 (1926); *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 780 (1947); *Schwartz v. Texas*, 344 U.S. 199 (1952).

In *Bethlehem Steel Co. v. New York Labor Relations Board*, *supra*, at 773, this Court established tests for analysis of state legislation where "Congress has outlined its policy in general and inclusive terms and delegated determination of their specific application to an administrative tribunal." State legislation occupying the same field the federal law encompasses may be upheld in the *interim*, pending the adoption by federal authorities of the comprehensive protective rules and regulations required to carry out the federal scheme. *Bethlehem Steel*, *supra* at 773, 774; *Northwestern Bell Telephone Co. v. Nebraska State Comm'n*, 297 U.S. 471 (1936); *Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). This test is applicable to the case at bar.

The tug-escort provision of the Washington Tanker Law, Section 190 of Chapter 88.16, is a basic alternative to greater tanker safety design and equipment features required elsewhere within that provision. The District Court, referencing 33 USCA §1221(3)(iv), concluded that

the PWSA preempts the tug-escort provisions of the Washington Tanker Law, even though this section does not directly refer to tug-escort. While it may be argued that tug-escort is authorized under that Section, it appears that the Coast Guard is only in the preliminary stage of promulgating minimum standards for tug assistance in confined waters. 41 Fed. Reg. 18770 (May 6, 1976). Until the Coast Guard standards are promulgated, Washington's tug-escort provisions should fill the gap in order to reduce the chances of oil spills in Puget Sound. The same is true for other cases where it is determined that federal regulation has not yet been adopted.

The mere adoption of federal regulations does not in and of itself void "interim" state regulation. This Court, in *Bethlehem Steel, supra*, further stated at page 774 that it is only "when the comprehensive [federal] regulations effectively governing the subject matter of the statute . . ." have been adopted that state regulation is invalid. Citing *Napier v. Atlantic Coastline R. Co., supra*. (Emphasis added) Oil pollution regulation is an area where some governmental authority must at all times have effective controls. The recent massive oil spills and groundings offshore Massachusetts and in the Delaware River and in Los Angeles Harbor attest to the ineffectiveness of existing Coast Guard regulation of oil-laden tankers in coastal waters. Shortly after these tragic occurrences, the federal authorities conceded that their regulatory scheme was ineffective. Until it is shown that effective federal regulation has been adopted incorporating the Washington Tanker Law provisions, the state law should stand.

Additionally, it may be asserted that there is no real conflict between the provisions of the PWSA and the Washington Tanker Law. The Washington Tanker Law is aimed at preventing oil pollution from tankers. While the PWSA is couched in structural safety and environ-

mental terms, as stated by the District Court, there are no assurances that the environmental interests will be given greater or equal application as the structural matters in the federal regulatory scheme. It is now settled that prevention of oil pollution is a matter for the legitimate exercise of the state police power. *Askew v. American Waterways Operators, Inc., supra*. See also *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). The Washington Tanker Law is an environmental measure within the scope of shared federal and state regulation. 33 USC §1517(k); 33 USCA Section 1370.

## II.

WHETHER THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL GOVERNMENT PREEMPTS THE PROPER EXERCISE OF THE STATE POLICE POWERS DESIGNED TO PROTECT THE STATE'S NATURAL RESOURCES FROM IRREPARABLE DAMAGE CAUSED BY OIL POLLUTION.

Congress, through the growing network of federal oil spill prevention and control legislation, has made clear its intention that the States shall participate in the overall scheme. The District Court's decision does not clarify the relationship of the oil spill prevention provisions of the PWSA to the Deepwater Ports Act of 1974, codified at 33 U.S.C.A. §1501, *et seq.*; the Federal Water Pollution Control Act of 1972, codified at 33 U.S.C.A. §1251, *et seq.* and the Coastal Zone Management Act of 1972 codified at 16 U.S.C.A. §1405, *et seq.* It is inconsistent for Congress to establish a comprehensive oil spill prevention program with clear opportunities for state participation on one hand, only to preempt the States from participation on the other.

Decisions of this Court have sustained the exercise of the state police power in many areas of maritime activities concurrently with the federal government. *Huron Portland Cement Co. v. Detroit, supra*, at 442.

Starting with *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1951), (state pilots); *Kelly v. Washington*, 302 U.S. 1 (1937), (local inspection of motor-driven tugs engaged in interstate commerce); *Huron Portland Cement Co. v. Detroit*, *supra*, (application of municipal air pollution standards to vessels engaged in interstate and foreign commerce); and ending with *Askew v. American Waterways Operators, Inc.*, *supra*, (sanctioning state regulation of any "requirement or liability" to prevent and mitigate the irreparable damages resulting from oil pollution), this Honorable Court has recognized the increasing State interest and role in protecting the health, safety and welfare of their citizens and natural resources. As a consequence, State participation in areas of the maritime law has been broadened. The District Court's decision implies that this line of cases has no application to the present situation. Only this Court can resolve the matter.

### III.

WHETHER THE INTERSTATE AND FOREIGN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION PRECLUDES THE STATES FROM PROTECTING THE HEALTH, LIFE AND SAFETY OF THEIR CITIZENS AND NATURAL RESOURCES FROM THE DANGERS OF OIL POLLUTION FROM VESSELS.

The "commerce" issue was not addressed by the Court below. Certain incursions which have traditionally been labeled as "burdens" upon interstate and foreign commerce have been sustained in order to allow the respective states to exercise their police powers. *Cooley v. Board of Port Wardens*, *supra*; *Huron Portland Cement Co. v. Detroit*, *supra*; *Cities Service Gas Co. v. Peerless Co.*, 340 U.S. 179 (1950); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *American Can v. Oregon Liquor Control Comm'n*, 517 P.2d 691 (1973); *Procter and Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

The exercise of the state police powers must continuously expand to meet the larger and more serious exigencies. See *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Potomac Sand & Gravel Co. v. Governor*, 266 Md. 358, 371 (1972). When the exercise of the police powers burdens interstate and foreign commerce, then it must be determined if this burden is justifiable. The cost of tug escort contemplated by Section 88.16.190 of the Washington Tanker Law is such a miniscule portion of the total cost of tanker transport of oil (paragraph 78 of the Pretrial Order), that it is commonly known in the transport industry as "cheap insurance". (Maryland-Maine Amici Curiae Brief in the record at 20.) Similar analyses can be made of the double bottom, and equipment provisions of the Washington Tanker Law. These costs are weighed against the costs to marine resources of oil spills. If it is determined that the Washington Tanker Law imposes a burden on interstate and foreign commerce, there are adequate facts set forth in the Pretrial Order to enable this Court to determine if the burden exceeds permissible limits.

## CONCLUSION

The issues presented to this Court transcend their application to the parties involved. If the District Court opinion stands, it would prohibit coastal states from enacting legislation reducing serious risks posed by the increasing oil tanker trade. The states cannot be expected to refrain from action while their marine resources are being destroyed or threatened by massive oil pollution from tankers, pending implementation of an effective federal program.

We respectfully request that this Court note probable jurisdiction in this case.

Respectfully submitted,

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## APPENDIX A

### OPINION

*United States District Court  
Western District of Washington  
at Seattle*

No. C 75-648M

*Atlantic Richfield Company,*  
Plaintiff,

and

*Seatrail Lines, Incorporated,*  
Intervening Plaintiff,

v.

*Daniel J. Evans, Governor of the State of Washington;  
Slade Gorton, Attorney General of the State of  
Washington; William C. Jacobs, Chairman, and  
Harry A. Greenwood, Benjamin W. Joyce, Philip H.  
Luther, and J. Q. Paull, Members, Board of Pilotage  
Commissioners; and David S. McEachran, Whatcom  
County Prosecuting Attorney,*

Defendants,

and

*Coalition against oil pollution, National Wildlife  
Federation, Sierra Club, Environmental Defense  
Fund, Inc., and Christopher T. Bayley, King County  
Prosecuting Attorney.*

Intervening Defendants.

Before: Goodwin, Circuit Judge, and McGovern and  
East, District Judges.

## PER CURIAM.

Atlantic Richfield Company (Arco) and Seatrain Lines, Inc., sued named officials of the State of Washington to enjoin enforcement of a 1975 Washington law regulating oil tankers operating in the Puget Sound. Jurisdiction is conferred by 28 U.S.C. §§1331 and 1337, and this three-judge court was convened in accordance with 28 U.S.C. §§2281, 2284.<sup>1</sup>

At the outset, the State of Washington challenges our jurisdiction, asserting sovereign immunity under the Eleventh Amendment. Aware of the rule in *Ex Parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the *Young* "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so,<sup>2</sup> will have ample opportunity to reconsider *Young*.

The challenged statutes are found in Chapter 125, Laws of Washington, 1975, 1st Extra Sess., codified at R.C.W. §§88.16.170, *et seq.* (the Tanker Law). The Tanker Law regulates oil tankers operating in Puget Sound.<sup>3</sup> Section 2 of the Tanker Law requires any tanker in excess of 50,000 deadweight tons (dwt) to employ a locally licensed pilot. Section 3(1) absolutely prohibits "supertankers", that is, those larger than 125,000 dwt. And §3(2) prescribes some minimum design specifications (shaft horsepower, twin screws, double bottoms, and twin radars) for tankers between 40,000 and 125,000 dwt. A proviso in §3(2) waives these design specifications for tankers accompanied by an appropriate complement of tugboats.

Arco and Seatrain contend that the state's restrictions are preempted by federal regulation in the field.

<sup>1</sup> The Three-Judge Court Act was modified by — Stat. — (1976). Section 7 of that modification specifically denied any retroactive application of the change. Since this case was heard before the change, our jurisdiction is determined by the former law.

<sup>2</sup> See 28 U.S.C. §1253 (1970).

<sup>3</sup> By "Puget Sound" we mean those waters east of a line extending from Discovery Island Light south to New Dungeness Light. R.C.W. §88.16.190.

are violative of the commerce clause, and invade the foreign affairs powers of the United States.

We are persuaded that federal law has preempted the field. Title I of the Ports and Waterways Safety Act of 1972 (the PWSA), 33 U.S.C. §§1221 *et seq.*, establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers. Under the PWSA, the Coast Guard can create traffic-control systems for Puget Sound, and it has done so. 33 C.F.R. Part 161, Subpart B. The PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. 33 U.S.C. §1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act of 1936, 46 U.S.C. §§391a. It empowered the Coast Guard to regulate design, construction, and maintenance of tankers operating in United States waters. See proposed regulations, 41 Fed. Reg. 15859 (April 15, 1976).

The purpose of the original Tank Vessel Act, and of Title II of PWSA, was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted §3(2) of Washington's Tanker Law.

Washington asserts that the minimum design specifications required by §3(2) of the Tanker Law were not preempted, because they can be avoided if the tanker has a tugboat escort. Congress has given the Coast Guard authority to require tugboat escorts in Puget Sound under hazardous conditions. 33 U.S.C. §1221(3)(iv). And the Coast Guard has considered doing this. Department of Transportation, Coast Guard, Final Environmental Impact Statement [on the] Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 71 (August 15, 1975). We believe that the tugboat-escort provision of the Tanker Law has also been preempted by the federal law.

Arco and Seatrain also argue that § 2 of Washington's Tanker Law (requiring a local pilot on all tankers larger than 50,000 dwt) has been preempted. Insofar as the Tanker Law prohibits a tanker "enrolled in the coastwise trade" from navigating Puget Sound unless it has a local pilot, the statute is void; it conflicts with clear federal law on that subject. 46 U.S.C. §§ 215, 364 (1970).

Recognizing the difficulty of its position, the State of Washington argues that its Tanker Law is part of a comprehensive coastal management plan, and that it should be upheld on that ground. "Cooperative federalism" has been the congressional policy for designing a United States environmental policy. The Congress funded and encouraged the coastal states to design comprehensive and forward-looking coastal management plans. 16 U.S.C. §§ 1451 *et seq.* Congress has invoked "cooperative federalism" — or at least some state involvement — in virtually all of its water-related regulatory programs: The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*; the Clean Air Act, 42 U.S.C. § 1857; the Estuarine Act of 1968, 16 U.S.C. §§ 1221 *et seq.*; and the Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501 *et seq.*

Congress has used "cooperative federalism" in forming environmental regulations. But the State of Washington fails to note that in those statutes Congress explicitly invited state participation in various phases of the formation of the regulatory scheme. The PWSA, on the other hand, does not invite such state participation; it does not share regulatory authority over oil tankers with the states.

Supporting its position, Washington cites *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), and *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960). The *Askew* case upheld Florida's law imposing strict liability in tort on oil spillers. The Court held that the state regulatory scheme did not conflict with federal regulation of oil tankers. But that Florida statute did not attempt to regulate the design of the tanker or tanker operations, which were already federally regulated. The *Askew* case involved the Federal Water Quality Control Act, not the PWSA, and

the holding of the Court was in part reflective of the congressional policy of "cooperative federalism" in the Federal Water Quality Control Act.

In the *Huron Portland Cement* case, a city's smoke-control ordinance was applied against a vessel engaged in interstate commerce. The Court observed that the environmental purpose of Detroit's ordinance was not preempted by federal safety inspection regulations. There was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance." 362 U.S. at 446. Since the PWSA introduced environmental considerations into the federal tanker regulations,<sup>4</sup> the State of Washington cannot say that there is "no overlap" between the state and federal laws.

Finally, the State of Washington asserts that the Commerce Department's approval of its coastal management plan (to which the Tanker Law is related) somehow waives federal preemption of the area. The Secretary of Commerce can approve a state's coastal management plan (thereby making it eligible for federal funding) only if "the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b) (1970). The Secretary may or may not have "considered" the views of the Coast Guard. The Secretary may or may not have noticed the preemptive effect of the PWSA on Washington's Tanker Law. That is not before us. We cannot read the Secretary's approval of a coastal management plan, to which the Tanker Law is only collaterally related, as foreclosing our inquiry into the federal preemption of oil tanker regulation.

Finally, the state and the other states filing amici briefs have argued with some conviction that a state's officials, responsible to its voters, are better able to protect the state's shoreline environment than is the Commandant of the Coast Guard, headquartered on the

<sup>4</sup> One of the primary reasons for the passage of the Ports and Waterways Safety Act was concern over the environment. The introductory clause of Title I states that the purpose is "to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage." 33 U.S.C. § 1221.

other side of the continent. This argument presents legislative, rather than judicial, policy considerations.

Because the Washington Tanker Law conflicts with federal law preempting the same subject matter, the state law is void. The plaintiffs have asserted a number of other grounds for declaring the statute void. It is unnecessary to reach these other points.

It is likewise unnecessary to grant an injunction. It is presumed that the responsible officials of the State of Washington will not undertake to enforce the statute pending such further appeals as may be taken. The clerk will enter judgment.

Neither party shall have costs.

ALFRED T. GOODWIN,  
United States Circuit Judge  
WALTER T. MCGOVERN,  
United States District Judge  
WILLIAM G. EAST,  
United States District Judge.

# ORDER

*United States District Court  
Western District of Washington*

*No. C75-648M*

*Atlantic Richfield Company,*  
Plaintiff,

and

*Seatrail Lines, Incorporated,*  
Intervening Plaintiff,

v.

*Daniel J. Evans, Governor of the State of Washington;  
Slade Gorton, Attorney General of the State of  
Washington; William C. Jacobs, Chairman, and  
Harry A. Greenwood, Benjamin W. Joyce, Philip H.  
Luther, and J. Q. Paull, Members, Board of Pilotage  
Commissioners; and David S. McEachran, Whatcom  
County Prosecuting Attorney,*

*Defendants,*

and

*Coalition against Oil Pollution, National Wildlife  
Federation, Sierra Club, Environmental Defense  
Fund, Inc., and Christopher T. Bayley, King County  
Prosecuting Attorney,*

*Intervening Defendants.*

THIS MATTER came before the undersigned, one of the three judges empanelled to hear and determine the above entitled cause, in accordance with Title 28 U.S.C. §§ 2281 and 2284 and in furtherance of the unanimous opinion of the said three judges which has now been filed herein, it is hereby

ORDERED, ADJUDGED and DECREED that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified at R.C.W. §§ 88.16.170, *et seq.* (The Tanker Law) be and the same is hereby declared null and void and of no force and effect. It is further

ORDERED that the application of the plaintiff for an order enjoining the responsible officials of the State of Washington from enforcing the said statute pending any appeal of this matter be and the same is hereby denied; and it is further

ORDERED that no party to the cause shall recover costs.

DATED this 23rd day of September 1976.

WALTER T. MCGOVERN,  
Chief United States  
District Judge.

## APPENDIX B

### CHAPTER 125

[Substitute House Bill No. 527]

#### OIL TANKER TRANSPORTATION ON PUGET SOUND AND ADJACENT WATERS

AN ACT Relating to water pollution from petroleum spills; and adding new sections to chapter 88.16 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 88.16 RCW a new section to read as follows:

Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.

For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

It is therefore the intent and purpose of sections 2 and 3 of this 1975 act to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and

maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.

**NEW SECTION.** Sec. 2. There is added to chapter 88.16 RCW a new section to read as follows:

Notwithstanding the provisions of RCW 88.16.070, any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters and shall be liable for and pay pilotage rates pursuant to RCW 88.16.030 as now or hereafter amended.

**NEW SECTION.** Sec. 3. There is added to chapter 88.16 RCW a new section to read as follows:

(1) Any oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light.

(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

- (a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and
- (b) Twin screws; and
- (c) Double bottoms, underneath all oil and liquid cargo compartments; and
- (d) Two radars in working order and operating, one of which must be collision avoidance radar; and
- (e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

**PROVIDED,** That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: **PROVIDED FURTHER,**

That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: **PROVIDED FURTHER,** That a tanker of less than forty thousand deadweight tons is not subject to the provisions of this act.

**NEW SECTION.** Sec. 4. There is added to chapter 88.16 RCW a new section to read as follows:

*The Washington utilities and transportation commission is authorized to make rules and regulations necessary to implement the provisions of this act.*

**NEW SECTION.** Sec. 5. The House and Senate Transportation and Utilities Committees are authorized and directed to study the feasibility, benefits, and disadvantages of requiring similar pilot and tug assistance for vessels carrying other potentially hazardous materials and to submit their findings and recommendations prior to the 45th session of the Washington legislature in January, 1977. Such study shall also include a report on the feasibility, benefits and disadvantages of requiring vessels under tug escort to observe a speed limit, and such study shall include a discussion of the impact of a speed limit on the maneuverability of the vessel, the effectiveness of the tug escort and other legal and technical considerations material and relevant to the required study. Such study shall also include an evaluation and recommendations as to whether there should be a transfer of all duties and responsibilities of the board of pilotage commissioners to the Washington utilities and transportation commission or other state agency, and alternate methods for establishing fair and equitable rates for tug escort and pilot transfer.

**NEW SECTION.** Sec. 6. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

*NEW SECTION. Sec. 7. The provisions of this 1975 act shall expire on June 30, 1978.*

Passed the House May 21, 1975.

Passed the Senate May 9, 1975.

Approved by the Governor May 29, 1975, with the exception of sections 4 and 7 which are vetoed.

Filed in Office of Secretary of State May 29, 1975.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith without my approval as to two sections Substitute House Bill No. 527 entitled:

"AN ACT Relating to water pollution from petroleum spills."

This bill provides, among other things, safety standards for oil tankers and other precautionary measures for prevention of major oil spills in Puget Sound and adjacent waters.

Section 4 of the bill authorizes the Utilities and Transportation Commission to implement the provisions of the act by rules and regulations. I am puzzled over this delegation of major responsibility to the commission, which has had no previous experience or expertise in the area. Nor is there funding provided which might allow the commission to do a creditable job in this new field of responsibility. Elsewhere in the bill a study is authorized on the desirability of transferring the duties and responsibilities of the Board of Pilotage Commissioners to the Utilities and Transportation Commission or any other appropriate state agency. Until there are findings determined in such study which confirm the need to assign the responsibility of implementing and enforcing the provisions of this act to the commission, I am not willing to allow a situation to exist where separate agencies in state government have substantially overlapping duties in this area of increasing importance without clear direction from the Legislature.

Section 7 provides an expiration date for the act of June 30, 1978. Few would disagree that this state must soon decide and act on long range solutions to the problems created by the transportation of oil in massive quantities in Puget Sound waters. By passing this bill, the Legislature has decided that at least in the near future, oil tankers exceeding 125,000 deadweight tons should not be permitted to enter these waters. The study provided in section 5 may well offer some additional alternatives. The expiration date, however, rather than encouraging all parties to develop sound long range solutions, would instead discourage such efforts. This state could, conceivably, find itself in the second half of 1978 faced with unprecedented super-tanker traffic in Puget Sound waters with all the attendant hazards but without any capability to prevent or reduce the risks of oil spills likely to produce catastrophic and permanent damage to the unique environment of the area. The expiration date would also leave the oil industry and others affected in an untenable state of uncertainty over permissible and impermissible activities in the transportation of oil into this area. Neither public nor private interests would be benefited by such uncertainty.

For the foregoing reasons, I have determined to veto sections 4 and 7 of the bill. With the exception of these sections, the remainder of the bill is approved."